

IN THE

# Supreme Court of the United States

October Term, 1943.

No. 436

L. METCALFE WALLING, ADMINISTRATOR OF THE  
WAGE AND HOUR DIVISION, UNITED STATES  
DEPARTMENT OF LABOR,

Petitioner,

versus

JAMES V. REUTER, INC.,

Respondent.

On Writ of Certiorari to the United States Circuit Court  
of Appeals for the Fifth Circuit.

## BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT.

PREFACE.

As will appear from the record, counsel for respondent has filed with this court a "Motion to Recall the Writ of Certiorari" issued herein, on the ground that the respon-

dent, a Louisiana Corporation, has been dissolved as provided by the laws of the State of Louisiana, and no judgment that this court could render could be carried into effect. Counsel is plainly perplexed as to his duty as a Member of the Bar of this Honorable Court under the exigencies presented in this case. If the motion to recall the writ of certiorari is granted, the necessity for this brief and counsel's appearance for argument is unnecessary. *Contra*, if the motion is denied, counsel occupies the position of representing a corporation whose legal existence has been terminated, with no reservation in the dissolution proceeding or provided by the laws of the State of Louisiana, to continue with this litigation. Therefore, counsel has concluded to present this brief and appear in argument in the conscientious recognition of his obligation to his non-existent former client, who discharged the expense therefor prior to dissolution, subject to the pleasure of the court.

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#### QUESTIONS PRESENTED.

1. Did the intrastate selling and delivery by a local wholesale produce merchant to local ship chandlers of "fresh" vegetables, fruits and produce to provision boats for the consumption of the crews of such vessels, subject the employees of the wholesale produce merchant to the provisions of the Fair Labor Standards Act, as being "engaged in commerce".
2. Were the employees of a wholesale produce merchant engaged, as a matter of law, in the "production of

- goods for commerce" within the meaning of the Fair Labor Standards Act, whose duties were to unload, uncrate, examine, sort, select and repackage fresh fruit, vegetables and produce, the orders for which are made up from stock on hand, approximately fifty percent of which is purchased from out of state sources.
- 
3. Were the employees of a wholesale produce merchant who purchased approximately 50% of its fresh fruit, vegetables and produce from out of state sources for delivery to its switch track in refrigerated cars which were used as temporary night storage space for produce that may have been on hand at the end of the day, engaged "in commerce" within the meaning of the Statute, because they unloaded and hauled such produce to the merchant's place of business in preparation of orders for delivery to the merchant's customers.
4. Where the findings of fact of the District Court negatived rather than supported the contention that the employees of a wholesale produce merchant spent a substantial portion of their time "in commerce" or in the "production of goods for commerce" a Circuit Court is authorized to draw its own conclusions therefrom.

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#### STATEMENT.

This suit was brought by the Administrator of the Wage and Hour Division on January 23rd, 1942, to en-

join the Reuter Company, a Louisiana Corporation, (now dissolved), from violating certain provisions of the Fair Labor Standards Act. (R. 1-5.)

The facts as found by the District Court are as follows: The Reuter Company was engaged in purchasing, selling and distributing fresh fruits and vegetables, and employed from 10 to 15 employees, including office help, warehousemen and truckdrivers. (R. 18.) Approximately 50% of the produce sold by the Reuter Company was purchased from out of state sources. This produce arrived in refrigerated railroad cars which averaged from 12 to 20 cars per month, and were switched to a siding known as "REUTER SWITCH". (R. 18-19.) The Reuter Company used these cars from two to five days as temporary night storage for produce on hand at the end of the day. (R. 20.) All the vegetables arriving from other states were unloaded from the freight cars and brought to the Reuter's place of business to be uncrated, unpacked and examined and to make up orders from stock on hand for delivery to intrastate customers, including an average of twelve orders a day for shipment to out-of-state customers via the Railway Express whose trucks came to the Reuter's place of business each day and the out-of-state orders loaded thereon by Reuter's employees. (R. 19.) Because of their perishable nature, there was a very rapid turnover of the produce. (R. 20.)

Only 5% of the total yearly sales were made to out-of-state customers. (R. 19.) The warehouse employees sorted, selected, repackaged and handled the produce, without distinction as to its ultimate destination, orders

being made from stock on hand. (R. 19.) The Reuter Company sold produce to local ship chandlers who purchased same to provision boats for oceangoing voyages. (R. 19.) The bulk of the produce purchased by the local ship chandlers was picked up by them in their own trucks at the Reuter's place of business. (R. 19.) Occasionally, however, Reuter's truck drivers delivered some of this produce to the docks. (R. 19.)

The District Court found the hours worked by the warehousemen and truck drivers ranged from 55 to 75 hours per week (R. 20), but the truck drivers spent not more than 1½ hours a day in unloading produce from the freight cars and hauling it to Reuter's place of business. (R. 20.)

The District Court held (1) because of the rapidity in turnover of produce received from out-of-state sources due to their perishable nature and Reuter's method of handling them; there was a continuity of movement to Reuter's customers, whether local or distant, and all employees of the company were an integral part of that movement and engaged "in commerce" within the meaning of the Act. (R. 20, 21-22); (2) that employees who sorted, picked over, handled, packaged, and repackaged produce in Reuter's place of business without regard to the final destination thereof, part of said goods being regularly shipped to out-of-state customers in the normal course of business, were producing goods for commerce within the meaning of the Act. (R. 21); that the employees who prepared and shipped orders to out-of-state

customers and those who prepared and delivered orders to ship chandlers for provisioning of vessels on their voyages were engaged in commerce within the meaning of the Act. (R. 21.)

The Circuit Court of Appeals reversed and remanded the case on the grounds that (1) the lower court erred in ruling that the produce had not come to rest at Reuter's premises (R. 31, 32); (2) that employees who delivered goods to ship chandlers and to ships for the provisioning of the crew were not engaged in commerce within the meaning of the Act (R. 30-31); (3) that in the absence of a showing that a substantial portion of the time of Reuter's employees were spent in interstate activities, the fact that 5% of the total sales of defendant are made to out-of-state customers, is insufficient to establish they were within the provisions of the Act (R. 32, 33); (4) that the lower court erred in holding that the sorting, repackaging and handling of goods constituted production of goods for commerce within the meaning of the Act. (R. 30.)

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## SUMMARY OF ARGUMENT.

### I.

In the brief of the petitioner, on the question of vegetables and produce sold and delivered to ship chandlers, it is stated, "it seems unlikely that the Circuit Court of Appeals seriously questioned the interstate character of

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these transactions. Certainly it is too late to deny that the business of selling merchandise within a State for transportation beyond the State is interstate commerce".

The writer of this brief most certainly believes the Circuit Court of Appeals seriously questioned the interstate character of these transactions, both from the factual issues before the court as well as the applicable law.

To answer the assumption of the petitioner's argument, as quoted above, requires a two-fold analysis. If the petitioner is referring to their contention of the alleged continuity of movement of these fresh vegetables, we believe a study of the findings of fact belie the interstate character of these transactions. The District Court found as a fact that vegetables and produce were sold to ship chandlers, who purchased this produce without specifically advising Reuter of the destination and proposed use thereof, the bulk of which was picked up by the ship chandlers in their own trucks at the Reuter's place of business, save on occasions Reuter's trucks delivered orders for boats docked in the New Orleans Harbor. (R. 19.) In the finding of fact, it is stated that orders are made up from stock on hand (R. 19), and since it is shown that only 50% of the fresh vegetables and produce which were sold by Reuter were received from out-of-State sources, to hold that these particular sales were comprised of the out-of-State shipments exclusively would require resort to conjecture. But conceding, without admitting, that the particular sales were comprised exclusively of vegetables received from out-of-State sources, to hold they assumed an interstate character because of that fact alone, would require the court to ignore the

coming to rest doctrine urged in Part III of this brief, and the further fact that the District Court found as a fact that these sales were made to the ship chandlers themselves as local transactions, who in the majority of cases picked up their purchases in their own trucks at Reuter's place of business (R. 19), and the Reuter Company was not specifically advised by the purchasers of the destination and proposed use thereof. (R. 20.) True, the Circuit Court of Appeals, in their opinion reversing the District Court, discusses the question of goods after delivery to ultimate consumer as being excluded and hence not in commerce. But we believe a careful study of the opinion by the Circuit Court of Appeals will show its author was of the opinion and intended to hold that goods sold to ship chandlers, who picked up their purchases at Reuter's place of business without specifically advising Reuter of the destination and proposed use thereof, as well as produce delivered by Reuter to docks to provision vessels, were not sold, shipped or delivered in "interstate commerce". As to those sold to ship chandlers without any knowledge on the part of Reuter as to their destination and proposed use, we fail to see in what respect they different from any other local transaction. The record shows this produce was to provision vessels for oceangoing voyages, which can hardly mean other than the consumption of the crew. If the contention of the petitioner is sustained, then any corner grocer who sells a box of cakes to a customer who consumes the cakes beyond the border of the State in which the purchase is made, subjects the grocer to the provisions of the Act. We do not believe Congress had any such intention. Would the sale of gasoline to a motorist,

who, without any knowledge of its intended use or destination by the vendor, subject the seller thereof to the Act as being in interstate commerce, because the purchaser drove across a state line before its complete consumption? We think not.

Again, with regard to the employees preparing for and delivering produce to the docks, destined for the consumption of crews of vessels, counsel for the petitioner contends such delivery constitutes "production" of goods for commerce, because although delivery was made to the ultimate consumer, Section 3 (i) of the Act which defines "goods", exempts such delivery only after the goods have been withdrawn from commerce. The fallacy of this argument, as already exemplified in the brief in opposition to the application for writs, consists in that counsel assumes the very point to be established, namely, that the produce was still "in commerce" and that the employees were engaged in "production of goods for commerce".

The cases relied on by counsel for the petitioner, namely, *Hamlet Ice Co. v. Fleming*, 127 F. (2d) 165 (C. C. A. 4) and *Chapman v. Home Ice Company*, 136 F. (2d) 353, (C. C. A. 6), are not apposite to the present case for there the question involved was whether employees employed in the "production" of ice for icing refrigerator cars were engaged in production of goods for commerce. In those cases it was held that Section 3 (i) of the Act did not relieve the **producers** of goods intended for shipment in Interstate Commerce. But here neither Reuter nor its employees "produced" anything and consequently Section 3 (i) has no application whatever.

In *Fleming v. Kenton Loose Leaf Tobacco Warehouse Co.*, 41 F. Supp. 225, also relied upon by petitioner in support of his contention that the employees were engaged in producing goods for commerce because they handled the produce of Reuter, the court did say that a warehouseman whose sole function was to lend its agencies to growers of tobacco for the sale of the tobacco in interstate commerce was a "producer". It is submitted however, that the decision rested primarily on the fact that the defendant and its employees were engaged "in commerce" and that the language relied on by counsel was *obiter dictum*. At any rate the *Kenton* case is distinguishable from the present case in that tobacco is susceptible of manufacture and the "handling" there involved could be said to be an occupation necessary to such manufacture.<sup>1</sup>

The Reuter Company was not engaged in the production or manufacture of any articles. How then can it be said its employees were so engaged?

This Court has repeatedly held that in enacting the Fair Labor Standards Act, Congress did not choose to exert its power to regulate commerce to the fullest extent but that the legislation was intended to apply to those persons actually engaged in commerce and not to those engaged in activities merely affecting commerce.<sup>2</sup> Thus in *McLeod v. Threlkeld*, which is the last expression of this Court

<sup>1</sup> Cf. *Calaf v. Gonzalez*, 127 F. (2d) 934 wherein it was held that employees engaged in the transportation and handling of sugar cane were engaged in "production" because the farming and sale thereof were incidental and necessary to the production of sugar.

<sup>2</sup> *Kirschbaum v. Walling*, 316 U. S. 517, 62 S. Ct. 1116, 86 L. Ed. 1638; *Walling v. Jacksonville Paper Company*, 317 U. S. 564, 63 S. Ct. 333, 87 L. Ed. 393; *McLeod v. Threlkeld*, 319 U. S. 491, 63 S. Ct. 1248.

on this subject, it was held that a cook, furnishing meals to a gang of maintenance-of-way employees of a railroad company, was not engaged in commerce within the contemplation of the Act. It must be noted that the car in which the meals were served was actually running on the railroad's tracks and followed the workmen to the scene of their activities. Yet the Court did not find that the cook was so intimately connected with interstate commerce as to be, in contemplation of law a part of it.

In view of this decision can it be consistently held that Reuter's employees who merely packed and generally prepared produce for delivery to ship chandlers, without regard to its final destination and proposed use, are so closely related to the transportation thereof in interstate commerce, simply because the crews of the vessels might not consume all this produce until the vessel ultimately reaches a foreign destination? We think not.

## II.

That the Fair Labor Standards Act by its own terms is limited in its application to persons engaged in interstate commerce or in the production of goods for commerce and that it does not extend to activities which merely affect commerce, is now firmly established, as is the principle that the applicability of the Act depends upon the character of the employees' work rather than that of the employer.<sup>3</sup>

<sup>3</sup> Kirschbaum v. Walling, 316 U. S. 517, 62 S. Ct. 1116, 86 L. Ed. 1638; Walling v. Jacksonville Paper Company, 317 U. S. 564, 63 S. Ct. 332, 87 L. Ed. 393.

Section 3 (j) of the Fair Labor Standards Act defines production as the "producing, manufacturing, mining, handling, transporting or in any other manner working on such goods or in any other process or occupation necessary to the production thereof".<sup>4</sup>

The words "production of goods" have a well defined meaning in the law. Production or manufacture is a transformation of raw materials into a change of form for use. Commerce, on the other hand, consists in the purchasing, selling and exchanging of commodities and the transportation incidental thereto.<sup>5</sup>

That a person may be engaged "in commerce" and yet not engaged in the "production of goods for commerce" within the intendment of the Act, is also beyond controversy.<sup>6</sup> The decision of the District Court, and applicant's contention in this court, is that the employees who sorted, selected, packaged and "handled" the Reuter Company's produce, in the preparation thereof for distribution and sale to customers, and particularly those engaged in the preparation of packages for sale to local ship chandlers were engaged in the "production of goods for commerce" within the meaning of the Act. It needs no citation of authority to show that whatever these employees were doing, they were not engaged in the pro-

<sup>4</sup> 29 U. S. C. A. Sec. 203 (j).

<sup>5</sup> Kidd v. Pearson, 128 U. S. 1, 9 S. Ct. 6, 32 L. Ed. 346; Carter Coal Co., 298 U. S. 238, 50 S. Ct. 855, 80 L. Ed. 1160; Utah Power and Light Co. v. Pfost, 52 F. (2d) 226.

<sup>6</sup> Kirschbaum v. Walling, *supra*; Johnson v. Dallas Downtown Development Co., 132 F. (2d) 287 (C. C. A. 5th); In re: Liquidation of New York Title & Mtg. Co., 39 N. Y. S. (2d) 893, 6 Labor Cases, p. 64213, Sec. 61,441; Cochran v. Florida National Building, 45 F. Supp. 830, 134 F. (2d) 615.

duction of goods; they were not engaged in changing the form of the produce to convert it into an entirely new article. True, this Court has held that the "handling" of goods constitutes production, but then only when such handling is in aid or necessary to the production of a manufactured article.<sup>7</sup> The work being done here was in aid of distribution, which is part of commerce, and in this instance of intrastate commerce, and by no stretch of imagination could be said to be in aid of production. The very limitation in the Act indicates that it is only such handling or transportation as is necessary for the production of goods, that will constitute "production" within the meaning thereof.<sup>8</sup>

### III.

It is necessary to take issue with the petitioner's recital of the factual issues as found in the third part of the argument on the question of the continuity of movement and coming to rest doctrine. On page 22 of petitioner's brief, it is stated: "Respondent's out-of-state purchases of fruits and vegetables are shipped in refrigerated freight cars which are shunted to respondent's siding. (R. 18-19.) From here, that part of the produce which is immediately unloaded is brought to respondent's premises, one block away, where it is examined, sorted, selected, packaged, and handled, without distinction as to its ultimate destination. (R. 19.) The bulk of the produce is then rapidly sold and delivered to respondent's customers, who com-

<sup>7</sup> Cf. Kirschbaum v. Walling, *supra*.

<sup>8</sup> 29 U. S. C. A. Sec. 203 (j) ". . . handling, transportation or in any other manner working on such goods, or in any process or occupation necessary to the production thereof."

prise both local and out-of-State wholesalers and retailers, as well as ship chandlers (R. 10-20). The refrigerated freight cars in which goods are received are used as temporary overnight storage place for produce not sold at the end of the first day (R. 20.)"

Because the subject of this controversy involves the handling of fresh vegetables, a highly perishable product, in an abundance of caution, we call the court's attention to the fact there is nothing in the findings of fact to show any immediate unloading of only a part of the produce which was brought to the Reuter's premises for examination, sorting, selecting, packaging and handling, without distinction as to its ultimate destination. The findings of fact as disclosed by the record reads:

(R. 19): All of the vegetables and produce arriving from out-of-State sources are unloaded from the freight cars and brought to defendant's place of business to be uncrated and examined before being sold.

(R. 20): \* \* \* In general, all goods received from out-of-State sources are unloaded, examined, sorted, repackaged, sold and delivered within one to five days after they are acquired by defendant. \* \* \*

We quote the foregoing for comparison with the verbiage used in petitioner's brief, to avoid any impression on the part of the court that only a portion of the produce was unloaded and brought to Reuter's premises, whereas the record shows that all the produce was unloaded and brought to the Reuter's premises.

But more important from the foregoing quotations is the fact that the District Court found all the vegetables and produce arriving from out-of-State sources after being unloaded from the freight cars and brought to Reuter's place of business, was uncrated and examined before being sold. (R. 19.) The court further found as a fact that "Orders are made up from stock on hand, etc.", (R. 19) which clearly shows a commingling with other vegetables and produce on hand and certainly establishes, without a doubt, these out-of-State shipments came to rest when placed on Reuter's premises, should the court reject our theory that they likewise came to rest when placed on Reuter's switch under the peculiar circumstances disclosed in this case.

Nor can the writer subscribe to the statement found in the petitioner's brief that the "bulk of the produce is then rapidly sold, etc.", (p. 23 of petitioner's brief). Here, again, the court must bear in mind we are dealing with fresh vegetables. The District Court found the out-of-State produce was sold and delivered within one to five days after acquired by Reuter. (R. 20.) We fail to find any statement in the findings of fact that there is a rapid selling of the bulk of this produce. Vegetables decay according to their character.

The uncrating of this produce at Reuter's place of business is indicative of the fact that it was taken out of its original packages, which could only be accomplished after the produce had come to rest in the state, void of any federal control thereof. The case of *Swift and Co. v. United States*, 196 U. S. 375, 25 S. Ct. 276, advanced by

the petitioner is not in point. Read the findings of fact by the District Court as one may, the conclusion is inescapable that this produce had come to rest within the state and was held there at the pleasure of the Reuter Company as owner for disposal either within or without the state and became a part of the general mass of Reuter's property within the state. In *State of Minnesota v. Blasius*, 54 S. Ct. 34,290 U. S. 1, 78 L. Ed. 131, this court said:

(54 S. Ct. 37): "Where property has come to rest within a state, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the state, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the state and is thus subject to its taxing power."

A tomato, unlike a potato, will spoil immediately. Holding a tomato five days would not be a rapid turnover. The same may be said of possibly all fresh vegetables. What the petitioner has failed to comprehend is that rapidity of movement must be understood in relation to the particular product under discussion. What may be a rapid movement in one case, may be entirely

\* *Champlain Co. v. Brattleboro*, 260 U. S. 376, 43 S. Ct. 146, 149, 67 L. Ed. 309, 25 A. L. R. 1195, the coal in *Brown v. Houston* "was being held for sale to any one who might wish to buy."

*Brown v. Houston*, 114 U. S. 622, 5 S. Ct. 1091, 1096, 29 L. Ed. 257, coal mined in Pennsylvania and sent by water to New Orleans to be sold there in the open market was held to have "come to its place of rest, for final disposal or use", and to be "a commodity in the market of New Orleans", and thus to be subject to taxation under the general laws of the state; although the property might, after arrival, be sold from the vessel on which the transportation was made for the purpose of shipment to a foreign port.

*Pittsburgh & Southern Coal Co. v. Bates*, 156 U. S. 577, 15 S. Ct. 415, 39 L. Ed. 538.

inapplicable in another because of the very nature of the product.<sup>10</sup>

Further, on page 23 of the petitioner's brief, we find the following: "The refrigerated freight cars in which goods are received are used as a temporary over-night storage place for produce not sold at the end of the first day." (R. 20.)

In the findings of fact the District Court states:

(R. 20): "This rapidity of movement is exemplified by defendant's custom of using the refrigerated freight cars in which goods are received as a temporary night storage place for produce that may be on hand at the end of the day."

The verbiage quoted from the petitioner's brief "at the end of the first day", may lead the court to believe that only the produce received from out-of-State sources in any particular car is permitted to remain in these refrigerated cars as temporary overnight storage. In fact the reference to the immediate unloading of only a part of the produce as found on page 22 of the petitioner's brief, supports this thought. However, as will be gleaned from the quoted portion of the District Court's findings of fact, these refrigerated cars were used as temporary storage place for the produce that Reuter had on hand at the end of the day.

The Reuter Company had no warehousing facilities, but used the refrigerated cars for such purposes. (R. 20.)

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<sup>10</sup> The Circuit Court of Appeals noted, for example, "They may not come to rest as long as an axe handle might on the shelf of a hardware merchant," etc. (R. 32.)

It is not inconsistent to hold, therefore, that the interstate character of the shipments terminated upon delivery by the carrier at Reuter's switch, and that any subsequent movement of the produce was purely local in character.

It is submitted therefore that when the produce purchased by Reuter from out of the State, came to rest when delivered to its railroad siding, that thereupon the interstate character of the shipments terminated and that the subsequent unloading, and hauling of the produce to the Reuter Company's premises was a movement purely intrastate.

Interstate Commerce begins and the regulatory power of Congress attaches only when goods commence their transportation interstate and terminates when the transportation is completed.<sup>11</sup>

And the ultimate test to determine whether interstate commerce has terminated is whether the goods have come to rest in the State of importation, or whether there is such a continuity of movement, that the interstate character of the transportation cannot be said to have terminated.<sup>12</sup> As was said by this court in the Schechter case,

(55 S. Ct. 849): "The mere fact that there may be a constant flow of commodities into a state does not mean that the flow continues after the property has arrived and has become commingled with the mass of

<sup>11</sup> Atlantic Coast Line Co. v. Standard Oil Co., 275 U. S. 257, 48 S. Ct. 107, 72 L. Ed. 770; Chicago M. & St. Paul Ry. Co. v. Iowa, 233 U. S. 334, 34 S. Ct. 592, 56 L. Ed. 988; Schechter Poultry Corporation v. United States, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570; Carter v. Carter Coal Co., 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160.

<sup>12</sup> Walling v. Jacksonville Paper Co., *supra*; Higgins v. Carr Brothers Co., 317 U. S. 572, 63 S. Ct. 337.

property within the state and is there held solely for local disposition and use."

In interpreting the Fair Labor Standards Act, it has been definitely established that the mere fact that a concern makes interstate purchases does not make it subject to the act, even though it makes such purchases in anticipation of future demands, but that there must be shown in addition, a continuity of movement to the ultimate consumer.<sup>13</sup> Reuter purchased some of its produce from out of state sources and had it delivered at its switch track. Reuter had no prior commitments, understandings or agreements with any one customer to whom the produce was to be sold. There were no prior contracts or prior orders to be filled. There is no question but that the produce purchased was Reuter's and that it remained its property until sold in the course of business.

In *Jewel Tea Company v. Williams*<sup>14</sup> it was held that the interstate character of shipments terminated when the merchandise was delivered to the importer's warehouse. Similarly, in *Gerdert v. Certified Poultry and Egg Co.*<sup>15</sup> it was held the interstate character of shipments terminated upon delivery by the common carrier to the employees of the importer.

Interstate commerce does not begin until the merchandise is actually committed to a common carrier for shipment interstate.<sup>16</sup> The preparation of articles for ship-

<sup>13</sup> *Walling v. Jacksonville Paper Co.*, *supra*; *Higgins v. Carr Bros. Co.*, *supra*; *Jax Beer Co. v. Redfern*, 124 F. (2d) 172.

<sup>14</sup> *Jewel Tea Co. v. Williams*, et al. 118 F. (2d) 202.

<sup>15</sup> *Gerdert, et al. v. Certified Poultry & Egg Co., Inc.*, et al. 38 F. Supp. 964.

<sup>16</sup> *Coe v. Errol*, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715; *Pennsylvania R. R. Co. v. Knight*, 192 U. S. 21, 24 S. Ct. 202, 48 L. Ed. 325; *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 43 S. Ct. 83, 67 L. Ed. 237; *Carter v. Carter Coal Co.*, *supra*; *In re: Greene*, 52 F. 104.

ment is nothing more than an authority affecting transportation. Whether it constitutes "commerce" within the meaning of the act is the question which this court must decide, in the light of past jurisprudence and the recent interpretation of the statute here involved.

Section 3 (b) of the Act defines commerce as meaning:

"\* \* \* trade, commerce, transportation, transmission or communication among the several states \* \* \*"<sup>17</sup>

This definition does not include the handling or packing of goods for trade, and to say it does would be to place a strained construction on the statute which would render the statute unconstitutional since the regulation of Congress attaches only when the goods are committed to the carrier for transportation from one state to another. *Coe v. Errol*, 116 U. S. 517, 6 S. Ct. 475, 479, where this court said:

"It is true, it was said in the case of *The Daniel Ball*, 10 Wall. 565: 'Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the States has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from one state to another. The carrying of them in carts or other vehicles or even floating them, to the depot where the journey is to commence, is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its

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<sup>17</sup> 29 U. S. C. A. Sec. 203 (b).

way to another state or committed to a common carrier for transportation to such state, its destination is not fixed and certain \* \* \*."

It is true Congress has the right to regulate commerce as well as any activity affecting commerce. But as has been repeatedly held by this Court, Congress did not choose to exercise this power to the fullest extent in enacting the Fair Labor Standards Act, and did not choose to regulate transactions which merely affected commerce. The preparation of articles for shipment even to other states is not commerce; it might be a transaction affecting such commerce, but this, Congress did not intend to regulate. It follows therefore that respondent's employees are not protected by the Act and that respondent is not subject to regulation under it.

But granting, *arguendo*, that respondent's employees were engaged in a commercial activity within the meaning of the Act, there is no showing that a substantial portion of their time was spent in such activity, and in the absence of such a showing, the court *a qua* was not authorized to issue the injunction. Fully 95% of respondent's produce was packed and prepared for sale to local customers. Only about 5% was sold to out-of-State customers. The packers prepared the packages indiscriminately, and there is nothing in the record of the amount of time they spent in preparing shipments to out of the State. In the absence of such a showing, it is impossible to say what portion of their time was spent in this activity or whether it was substantial enough to warrant the issuance of the injunction, and where there is a com-

plete failure to prove how much of the work done is interstate and how much intrastate, the court is powerless to determine the question.<sup>18</sup>

The most that can be said from the findings of fact by the District Court is that the hours worked by warehousemen, carmen and truckdrivers ranged from 55 to 75 hours a week. (R. 20.) As stated heretofore, of the total business done by the Reuter Company, only an average of 5% was for out of town customers, and these orders were picked up by the Railway Express at the Reuter's premises. This 5% consisted of approximately twelve orders a day. (R. 19.) In relation to the total sales as shown on page 19 of the Transcript of Record, the out-of-town business was negligible. The District Court further found that truck drivers usually spent one and one-half hours a day, sometimes longer, in unloading freight cars and hauling the produce to defendant's place of business. (R. 19.) This represents an average of 9 hours a week out of a total of 55 to 75 hours, and certainly could not be said to represent a substantial portion of the employee's daily or weekly time. Hence we urge that the conclusion of law by the District Court is not supported by the findings of fact. Nor are the authorities of the petitioner on the question of commingling of interstate and intra-state business applicable to the facts in this case. The District Court determined and there is no dispute over the

<sup>18</sup> Super Cold South West Co. v. McBride, 124 F. (2d) 90; White Motor Co. v. Littleton, 124 F. (2d) 92; Jax Beer Co. v. Redfern, 124 F. (2d) 1722.

fact that only 5% of Reuter's business was for out-of-State sources. (R. 19.) The record further shows the number of hours certain employees worked (R. 20), and the proportion of their time apportioned to interstate business (R. 19), should this court disagree with the contention urged in this brief. Having removed the uncertainty of the number of hours worked per week and the average hours devoted to the alleged interstate business, it was incumbent upon the District Court in compliance with the plain dictates of the statute to determine which of Reuter's employees spent a substantial portion of their time on interstate business, in the absence of which the issuance of a blanket injunction is unauthorized.

In answer to the contention of the petitioner that the District Court erred when it characterized its ruling as a conclusion of law (page 26 of petitioner's brief), we believe it is now an axiomatic rule of law, that where there is no controversy as to the factual issue, the ultimate conclusion is a question of law, or at least a mixed question of law and fact which may be reviewed by an appellate court. *United States v. Walter Pugh*, 99 U. S. 265, 25 L. Ed. 322; *Helvering v. Rankin*, 295 U. S. 123, 55 S. Ct. 732, 79 L. Ed. 1343; *Helvering v. Tex-Penn Oil Co.*, 300 U. S. 418, 57 S. Ct. 569, 81 L. Ed. 755.

### CONCLUSION.

It is submitted, therefore, that the injunction was improvidently issued and that the case should be reversed and remanded with directions that it be dismissed.

Respectfully submitted,

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